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April 9, 2024

Via Odyssey File & Serve (EFS)

Civil Clerk's Office
Berkshire Superior Court
76 East Street
Pittsfield, MA 01201

Re: Town of Lee, Massachusetts v. Monsanto Company, et al
Berkshire County Superior Court, C.A. No.: 2476CV00044

Dear Sir or Madam:

I am removing the above-referenced case from Berkshire County Superior Court to the United States District Court today, April 9, 2024.

Kindly provide me with certified copies of the docket sheet and all pleadings and papers filed to date, including the enclosed documents, together with an invoice for the fees incurred in obtaining these certified copies.

Thank you for your attention to this matter.

Very truly yours,

/s/ James M. Campbell

James M. Campbell

JMC/cnv
Enclosure
cc: Counsel of Record

MC

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT
CIVIL ACTION NO. 2476CV00044

TOWN OF LEE,)
MASSACHUSETTS)
))
Plaintiff,)
))
v.)
))
MONSANTO COMPANY;)
SOLUTIA INC.;)
PHARMACIA LLC; and)
GENERAL ELECTRIC .)
ELECTRIC CORPORATION)
))
Defendants.)
)

**NOTICE TO ADVERSE PARTY AND STATE COURT
OF REMOVAL OF ACTION TO FEDERAL COURT**

**TO PLAINTIFF TOWN OF LEE, MASSAHCUSETTS, AND TO THE CLERK OF THE
BERKSHIRE COUNTY SUPERIOR COURT FOR THE COMMONWEALTH OF
MASSACHUSETTS:**

PLEASE TAKE NOTICE that on April 9, 2024, Defendant General Electric Company, now operating as GE Aerospace, and improperly named as “General Electric . Electric Corporation” filed a Notice of Removal with the Clerk of the United States District Court for the District of Massachusetts, removing this action to that court pursuant to 28 U.S.C. § 1442(a)(1).

A true and correct copy of the Notice of Removal is attached hereto as Exhibit A. The instant Notice to Adverse Party and State Court of Removal of Action to Federal Court and Exhibit A are also being served upon Plaintiff, Town of Lee, Massachusetts, herewith.

PLEASE TAKE FURTHER NOTICE that pursuant to 28 U.S.C. § 1446, the filing of the Notice of Removal in the United States District Court for the District of Massachusetts, together with the filing of the Notice with this Court, effectuates the removal of this action and the

Superior Court shall proceed no further unless and until the case is remanded.

Dated: April 9, 2024.

DEFENDANT GENERAL ELECTRIC
COMPANY,

By its Attorneys,

/s/ James M. Campbell

James M. Campbell (BBO #541882)
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CERTIFICATE OF SERVICE

I, James M. Campbell, hereby certify that on April 9, 2024, I electronically filed the foregoing using the electronic filing system (EFS), Odyssey File and Serve, which will send notification of such filing to counsel of record, and served the foregoing via electronic mail on the following counsel of record:

Cristòbal Bonifaz, Esq.
Law Offices of Cristòbal Bonifaz
180 Maple Street
Conway, MA 01341
Tel: 413-369-4263
Cell Number 413-522-7604
Counsel for Plaintiff

/s/ James M. Campbell

James M. Campbell

EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

TOWN OF LEE, MASSACHUSETTS

Plaintiff,

v.

MONSANTO COMPANY

SOLUTIA INC.

PHARMACIA LLC

GENERAL ELECTRIC . ELECTRIC

CORPORATION

Defendants.

Case No.:

DEFENDANT GENERAL ELECTRIC COMPANY'S NOTICE OF REMOVAL

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

Please take notice that, pursuant to 28 U.S.C. § 1446, Defendant General Electric Company, now operating as GE Aerospace, and improperly named as “General Electric. Electric Corporation” (hereinafter “GE”), removes the above-captioned action from the Berkshire County Superior Court, Commonwealth of Massachusetts, Case No. 2476CV00044, to the United States District Court for the District of Massachusetts, pursuant to 28 U.S.C. § 1442(a)(1). Removal is appropriate¹ because Plaintiff brings claims as *parens patriae* against GE challenging actions that, according to Plaintiff, EPA “ordered GE” to take to pursuant to an Order² issued under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). The Order requires GE to remediate and restore a 100-mile stretch of the Housatonic River, which

¹ Plaintiff previously filed a complaint asserting similar claims against codefendants Monsanto Company, Solutia, Inc., and Pharmacia, LLC only, in the U.S. District Court for the District of Massachusetts, on March 30, 2023. *See The Town of Lee, Massachusetts v. Monsanto Co.*, Civil Action No. 3:23-CV-30035-MGM, ECF 1. In that complaint, Plaintiff alleged that this Court had jurisdiction over the parties and claims arising out of the same conduct at issue in the instant lawsuit. *See id.* ¶ 15.

² GE’s references to “2022 CERCLA Order” pertain to Exhibit DJ-3, attached to Plaintiff’s Complaint.

flows through the Town of Lee (“Lee” or “Plaintiff”).

Lee previously signed onto a Settlement Agreement in 2020 with GE, EPA, and many of the other surrounding greater-Berkshire municipalities in which all agreed to refrain from appealing the validity of the 2022 CERCLA Order in exchange for GE’s payment of \$63 million dollars to be divided among those towns as compensation for the affected areas. *See* Ex. 1, Compl. ¶ 14; Settlement Agreement Resolving Disputes Regarding October 2016 RCRA Corrective Action Permit Modification for the “Rest of River” (February 2020) (hereinafter “Settlement Agreement”). Despite that, the towns appealed the Settlement Agreement’s validity, which was upheld by the First Circuit. *Housatonic River Initiative v. U.S. Env’t Prot. Agency, New England Region*, 75 F.4th 248, 255 (1st Cir. 2023).

Given that Lee now has no legal ability to challenge the terms of the 2022 CERCLA Order or the actions GE has been ordered to take pursuant to it, it brings this action for damages, contending the actions it can no longer challenge have damaged Lee and its residents and that those damages are ongoing.³ Ex. 1, Compl. ¶ 18. This lawsuit thus directly challenges actions taken under the direction of a federal officer—EPA—and is in direct conflict with that federal officer’s determination that the actions challenged by Plaintiff’s Complaint “are protective of human health and the environment with respect to the areas addressed” and that “no further response actions for

³ The allegations giving rise to Plaintiff’s claims against GE are like those asserted by several personal injury plaintiffs in nine lawsuits presently pending before this Court. *See Czerno v. General Elect. Co.*, No. 3:23-cv-30099-MGM; *King v. General Elect. Co.*, No. 3:23-cv-30102-MGM; *Harford v. General Elect. Co.*, No. 3:23-cv-30103-MGM; *Romero v. General Elect. Co.*, No. 3:23-cv-30104-MGM; *Sullivan v. General Elect. Co.*, No. 3:23-cv-30105-MGM; *King v. General Elect. Co.*, No. 3:23-cv-30106-MGM; *Welch v. General Elect. Co.*, No. 3:23-cv-30107-MGM; *McDermott v. General Elect. Co.*, No. 3:23-cv-30108-MGM; *Jackson v. General Elect. Co.*, No. 3:23-cv-30109-MGM. GE removed these cases to federal court in 2023 pursuant to 28 U.S.C. § 1442(a)(1). The *Czerno* Plaintiff’s motion to remand is fully briefed for this Court’s consideration, and the parties have agreed the Court’s ruling in that case will apply to the other cases as well. *See, e.g., Harford v. General Elect. Co.*, No. 3:23-cv-30103-MGM, ECF No. 27.

the areas addressed . . . are necessary to protect human health and the environment.” Ex. 2, Consent Decree, at 46. Accordingly, this is a textbook case for federal officer removal under Section 1442. In support of federal officer removal pursuant to 28 U.S.C. § 1442(a)(1), GE states as follows:

BACKGROUND AND FACTS RELEVANT TO SECTION 1442 REMOVAL

A. GE Manufactured Products Containing PCBs for the United States Government.

1. PCBs are man-made chemical fluids that the electrical industry widely used, including in transformers and capacitors, from at least the 1930s through 1977, when the federal government banned their manufacture and use. Monsanto was the sole and exclusive manufacturer of PCBs in the United States during this time period. Ex. 3, Memorandum from R.W. Frahm to Field Sales District Managers (Apr. 18, 1972). PCBs were so widely used because they are “virtually free of fire and explosion hazards.” Ex. 4, Interdepartmental Task Force on PCBs, Polychlorinated Biphenyls and the Environment, at 12 (May 1972).⁴

2. As a federal defense contractor, GE manufactured large quantities of PCB-containing products for purchases by numerous agencies of the federal government. GE was supplying the military with capacitors containing PCBs even before the United States entered World War II. For example, in March 1940, the Chief Signal Officer of the Army Signal Corps approved the purchase of a GE Pyranol capacitor for the Army Signal Corps Laboratory. Ex. 5

⁴ The complete Interdepartmental Task Force memorandum, including all appendices, is available at:

<https://nepis.epa.gov/Exe/ZyNET.exe/9101IMNO.TXT?ZyActionD=ZyDocument&Client=EPA&Index=Prior+to+1976&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C70thru75%5CTxt%5C00000022%5C9101IMNO.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL>

March 8, 1940 Letter with request from Major Washburn of Army Signal Corp for a capacitor with Pyranol and approval of purchase by Order of the Chief Signal Officer.

3. During World War II, GE manufactured Pyranol-containing transformers and capacitors to fill orders from the United States military needed for the war effort. Ex. 6, Letter to U.S. Secretary of War (May 21, 1941), at 8 (appending a March 26, 1941, letter from GE to Monsanto urging increased production for defense-related demands).

4. As just one example, in November 1942, the Naval Bureau of Ordinance approved the purchase of three Pyranol transformers from GE by the Naval Ammunition Depot in Hawthorne, Nevada. Ex. 7, Teletype dated Nov. 17, 1942 from the Bureau of Ordinance to NAD Hawthorne; Ex. 8, Request from Captain Byrnes, USN Bureau of Ordinance to requisition three Pyranol Transformers from General Electric; Ex. 9, Teletype dated Nov. 17, 1942 from NAD Hawthorne to USN Bureau of Ordinance confirming need for purchase of three Pyranol Transformers from General Electric.

5. The United States War Production Board's "Authorizations of War Manufacturing Facilities Financed with Public and Private Funds through December 31, 1944" recorded that, as of May 1943, GE's Pittsfield facility was manufacturing "War Products" for the government with capacity for 2.5 million capacitors per quarter, and as of December 1944 with capacity for 18,200 modulators and transformers per quarter. Ex. 10, Authorizations of War Manufacturing Facilities Financed with Public and Private Funds through December 31, 1944. Plaintiff alleges that it was these very products—capacitors and transformers—that incorporated the PCBs and caused the contamination for which the Complaint seeks compensatory and punitive damages. Ex. 1, Compl. ¶¶ 61, 62, 70, 71, 76, 79, 85, 86, 93, and 95.

6. The United States Civilian Production Administration's List of Major War Supply

Contracts, July 1940 through September 1945, shows that GE's Pittsfield facility held multiple contracts to supply transformers and capacitors to the federal government to support the war effort, including the Army Corps of Engineers, Navy Bureau of Ordnance, and the Department of the Treasury. Ex. 11, Excerpt of United States Civilian Production Administration's List of Major War Supply Contracts, July 1940 through September 1945.

7. The key role of GE's Pittsfield facility in manufacturing electrical products with PCBs for the United States military's war effort can also be seen in two applications for Certificates of Necessity during WWII. In 1942, GE applied to the War Department for a Certificate of Necessity for, among other locations, its Pittsfield facility for manufacturing capacitors, stating that GE's Pittsfield facility had converted 100% of its output to support the war effort. Ex. 12, September 1, 1942 Application for Certificate of Necessity. In 1943, GE applied to the War Department for another Certificate of Necessity for, among other locations, its Pittsfield facility that manufactured "G.E. dielectric material No. 2681-2682 and promika capacitors." Ex. 13, July 9, 1943 Application for Certificate of Necessity.

8. GE's manufacture of Pyranol-containing transformers and Pyranol for the United States Department of Defense continued into the 1970s. Ex. 14, United States Army, PCB TMDL Action Plan at 23-27 (listing numerous GE transformers as currently in use at the Fort Myer & Henderson Hall installations); Ex. 15, Memorandum from Henry Vaness Dobson, Jr., to Judge Advocate General (June 26, 1987) (referring to a General Electric PCB transformer at the Navy's Piti Power Plant). Indeed, United States military installations included "thousands of electrical transformers and other electric equipment that either contain or are suspected to contain PCBs," many of which GE manufactured. Ex. 16, 1994 U.S. Gen. Accounting Office Report, at 2 ("The military services have significant quantities of PCBs in equipment such as electrical transformers

and capacitors on their installations.”).

9. In 1970 alone, the General Services Administration, Department of the Interior, United States Army, United States Navy, and other branches of the federal government purchased at least 6,750 pounds of Pyranol, meaning that each of these federal agencies had previously purchased numerous GE PCB-containing transformers that required replacement Pyranol. Ex. 17, Monsanto Report of Pyranol Sales (Dec. 1971). In 1971, the federal government again purchased more than 6,000 pounds of Pyranol. *Id.*

10. In a single shipment in December 1971, the United States Navy purchased more than 2,000 pounds of Pyranol. Ex. 18, United States Navy Invoice (Dec. 17, 1971). In February 1972, the Naval Supply Center in Oakland, California, again purchased over 2,000 pounds of “Pyranol . . . [manufactured] by General Electric Co.” Ex. 19, Naval Supply Center Invoice (Feb. 7, 1972).

11. By no later than February 1972, Monsanto discontinued all direct sales of Pyranol to end users. Ex. 20, Letter from T.L. Gossage to A.E. Peltosalo (Feb. 8, 1972). Accordingly, after February 1972, the federal government purchased its Pyranol for GE transformers directly from GE. *See generally id.*

12. The many GE sales to the United States armed forces are reflected in that, more than 15 years after domestic manufacturing of PCBs ceased, the military had thousands of transformers containing PCBs and other PCB-related items in continuing use. *See* Ex. 16, 1994 U.S. Gen. Accounting Office Report (listing the number of PCB-containing transformers and other PCB-related items still in the possession of the United States Navy and Air Force). At that time, the Navy still had 4,600 PCB-containing transformers and 1,861 other PCB-related items. *Id.* at 8. The Air Force still had 4,904 PCB-containing transformers and 2,599 other PCB-related items

in 1990. *Id.* And that says nothing of the Army, which purchased similar equipment from GE, but never made a comparable inventory thereof. *See id.*

13. The New Jersey Army National Guard, which is federally funded, and operated under federal control in certain circumstances, also purchased GE transformers. Ex. 21, Final Summary Report: Suspected PCB Containing Electrical Equipment Inventory, at 19, 23, 27, 38-40, 42-45, 49-52 (Feb. 2017) (stating that GE PCB-containing transformers exist at various Army National Guard installations in New Jersey).

B. The Federal Government Supervised, Controlled, and Required GE's Production of PCB-Containing Products Until It Banned PCBs in 1979.

14. The federal government was not a passive purchaser of PCBs. During the time period relevant to this case, the federal government worked hand-in-hand with GE by supervising and controlling GE's production of PCB-containing products—and, for a period of time, required that manufacturers like GE continue to use PCBs in certain applications.

15. In May 1972, multiple federal agencies, including the Department of Commerce and the EPA, issued an interdepartmental task force report on PCBs. That report concluded that the continued use of PCBs in the products GE manufactured was “*necessary* because of the significantly increased risk of fire and explosion and the disruption of electrical service which would result from a ban on PCB use.” Ex. 4, Interdepartmental Task Force on PCBs, Polychlorinated Biphenyls and the Environment, at 4 (May 1972) (emphasis added). That is, no safer alternative material could sufficiently guard against fire hazards in certain products. *Id.* at 4, 12.

16. In light of the necessity of PCBs, the federal government *mandated* that GE use PCBs in the products GE manufactured and the federal government purchased. Ex. 22, General Electric Company, The Role of Polychlorinated Biphenyls in Electrical Equipment, at 5-6 (Dec.

16, 1971) (referring to the “various codes, standards, and regulations that now effectively require or encourage the continued use of askarel-insulated equipment in many applications.”).

17. As EPA stated, “[v]arious Federal, state, and local conditions require[d] use of askarel [a generic term for PCB-containing fluids] in transformers” such as the ones manufactured by GE. Ex. 23, Environmental Protection Agency, Industry Views on the Use of Polychlorinated Biphenyls in Transformers and Capacitors, at 17 (June 1976).

18. In February 1972, OSHA adopted portions of the National Electrical Code that required GE to use PCBs in a number of applications. *See* 37 Fed. Reg. 3,431 (Feb. 16, 1972) (to be codified at 29 C.F.R. pt. 1910) (“Every new electrical installation and all new utilization equipment installed after March 15, 1972, and every replacement, modification, or repair or rehabilitation, after March 15, 1972, of any part of any electrical installation or utilization equipment installed before March 15, 1972, shall be installed or made, and maintained, in accordance with the provisions of the 1971 National Electrical Code.”); Ex. 24, Excerpts of National Electrical Code § 410-82 (1971) (“Transformers of other than the askarel-insulated or dry-type shall not be used.”).

19. In 1974, the United States Navy said that a continued supply of Pyranol from GE for use as a dielectric insulating fluid was “essential.” Ex. 25, Navy Letter to GE, Mar. 26, 1974. The Naval Facilities Engineering Command told GE that “[t]he Navy Department, and other agencies of the Department of Defense as well, have a substantial number of transformers and electrical devices in which the use of askarel rather than ordinary transformer oil is *essential*. Many of these are products of the General Electric Company.” *Id.* (emphasis added). The Navy further stated that “it is *essential* that askarel be procured for use by Government personnel in servicing these devices.” *Id.* (emphasis added).

20. The federal government also set procurement specifications for the PCB-containing products GE made and sold to the federal government. Ex. 26, Hearing on Toxic Substances Control Act, at 80 (Oct. 24, 1976) (stating that the “Department of Defense, the General Services Administration, and other agencies” had “procurement specifications . . . concerning the purchase of PCBs and materials containing PCBs”).

C. The Federal Government Bans PCBs in 1979.

21. In the early 1970s, the scientific community, electric industry, and federal government began scrutinizing PCBs in response to reports of their biopersistence and potential resulting health effects. *See id.* By the early-to-mid-1970s, most industrial uses of PCBs ceased. However, PCBs continued to be used, and they were even *federally mandated*, in certain electrical applications, such as transformers and capacitors, until the EPA ultimately banned their use and manufacture in 1979. Ex. 22, General Electric Company, The Role of Polychlorinated Biphenyls in Electrical Equipment, at 6 (Dec. 16, 1971) (referring to the “various codes, standards, and regulations that now effectively require or encourage the continued use of askarel-insulated equipment in many applications”). For example, in 1972, the United States Department of Labor, Occupational Safety & Health Administration (“OSHA”) adopted electrical standards necessitating the use of PCBs in a number of applications consistent with the 1971 National Electrical Code. *See* Electrical Standard, 72 Fed. Reg. 7,136 (Feb. 14, 2007) (to be codified at 29 C.F.R. pt. 1910); Application of Certain Electrical Standards, 37 Fed. Reg. 3,431 (Feb. 16, 1972) (to be codified at 29 C.F.R. pt. 1910).

22. Monsanto ended its domestic manufacture of PCBs in 1977, and the EPA subsequently issued a final regulation banning the manufacture of PCB-containing electrical equipment (transformers and capacitors) and phasing out most PCB uses. *See* Ex. 1, Compl. ¶¶ 2,

61, 66; *see also* 40 C.F.R. § 761.20 (identifying permitted uses of PCBs); 40 C.F.R. § 761.30(a) (“PCBs at any concentration may be used in transformers . . . and may be used for purposes of servicing including rebuilding these transformers for the remainder of their useful lives[.]”).

23. In April 1979, the EPA issued final regulations banning the manufacture of PCBs and phasing out most PCB use. Press Release, EPA, EPA Bans PCB Manufacture; Phases Out Uses (Apr. 19, 1979), *available at* <https://www.epa.gov/archive/epa/aboutepa/epa-bans-pcb-manufacture-phases-out-uses.html>. The EPA also issued final regulations governing PCB disposal. *See* 40 C.F.R. § 761.60. Accordingly, after April 1979, the federal government exercised control and direction over the disposal of PCBs as well.

D. GE’s Remediation of PCB Contamination Under the Control, Guidance, and Direction of the United States Government.

24. In 2000, a District of Massachusetts federal court “entered a consent decree between GE, the United States, and the states of Massachusetts and Connecticut that launched a \$300 to \$700 million cleanup effort, the bulk of which [would] be paid for by General Electric.” *Church v. Gen. Elec. Co.*, 138 F. Supp. 2d 169, 173 (D. Mass. 2001). That Consent Decree is highly detailed and more than 400 pages long, excluding the various Statements of Work and other appendices. Ex. 2, Consent Decree.

25. “The comprehensive remediation and restoration of the GE-Pittsfield/Housatonic River Site is being performed pursuant to [that] court-ordered Consent Decree.” Ex. 27, EPA: Cleanup Agreements for the GE-Pittsfield/Housatonic River Site, *available at* <https://www.epa.gov/ge-housatonic/cleanup-agreements-ge-pittsfieldhousatonic-river-site> (“EPA: Cleanup Agreements”); Ex. 2, Consent Decree.

26. The Consent Decree states that, “[s]olely for the purposes of Section 113(j) of CERCLA, the response actions selected and the Work to be performed by Settling Defendant shall

constitute response actions taken or ordered by the President.” Ex. 2, Consent Decree, at 7 (Background ¶ R). “Settling Defendant” is defined as “General Electric Company.” *Id.* at 34. Since 2000, GE has been remediating sites in the Pittsfield area and the Housatonic River under the control, guidance, and supervision of the EPA. Ex. 27, EPA: Cleanup Agreements.

27. The Consent Decree required EPA approval for each aspect of GE’s remediation that Plaintiff alleges was inadequate, including the Upland Disposal Facility. Ex. 2, Consent Decree, at 44 (“Commitments by Settling Defendant”).

28. The 2022 CERCLA Order is part of the work GE continues to do in furtherance of the remediation effort of the affected areas, and directly relates to the claims asserted against GE by the Plaintiff.

29. The 2022 CERCLA Order states that “this Permit, or severable portion(s) thereof, after the opportunity for challenges to the EPA Environmental Appeals Board as specified in the [Consent] Decree and described below in this Revised Final Permit, *shall be performed by [GE,] the Permittee[,]* as a CERCLA remedial action ***pursuant to the Consent Decree.***” Ex. 28, 2020 CERCLA Order, at 6 (emphasis added).

30. Furthermore, the 2022 CERCLA Order also required that:

All Permittee activities . . . *be conducted pursuant to this Permit and the [Consent Decree] under the oversight and approval of EPA.* All EPA approvals, disapprovals, or modifications of plans and other submittals under this Permit will be pursuant to Section XV of the CD, including the reasonable opportunity for review and comment by the Commonwealth of Massachusetts (MA) and Connecticut Department of Energy and Environmental Protection (CT DEEP). “Approval” by EPA, as used in this Permit, represents this process.

Id. at 12.

31. The Consent Decree mandates GE’s construction of the Upland Disposal Facility. The construction, use, and alleged consequences arising out of the Upland Disposal Facility form

the basis of Plaintiff's claims against GE.

I. GE TIMELY FILED THIS NOTICE OF REMOVAL.

32. GE has not been served with process, pleadings, or orders in the state court case. Pursuant to Local Rule 81.1, GE shall file with this Court certified or attested copies of all records and proceedings in the state court and a certified or attested copy of all docket entries in the state court.

33. GE timely removed this action under 28 U.S.C. § 1446(b)(1).

II. PLAINTIFF'S ALLEGATIONS

34. Plaintiff alleges that, after 40 years of study and litigation with GE, EPA "ordered GE in 2022 to make an effort to minimize the presence of the toxic product—polychlorinated biphenyls 'PCBs'—from a 100-mile portion of the Housatonic River." Ex. 1, Compl. ¶ 13.

35. Plaintiff alleges that EPA, GE, the City of Pittsfield, and the Towns of Lee, Lenox, Stockbridge, Great Barrington, and Sheffield entered into a settlement agreement under which the City and Towns agreed not to appeal the 2022 CERCLA Order in exchange for GE paying \$63 Million to be divided among the City and Towns. *See id.* ¶ 14.

36. Plaintiff alleges that EPA's 2022 CERCLA Order is binding and "cannot be overturned by municipal or local actions or by this Court as it has already been approved by the Court of Appeals of the First Circuit." *Id.* ¶ 17.

37. Plaintiff alleges that it relied on EPA to force GE to restore the Housatonic River and its banks to their original state. *Id.* ¶ 33.

38. Plaintiff alleges that the 2022 CERCLA Order "is at best a weak compromise of what EPA could do under the circumstances to reduce the risks to humans and the environment." *Id.* ¶ 35.

39. Plaintiff alleges that the 2022 CERCLA Order is contrary to the wishes of the majority of Lee's residents. *Id.* ¶ 113.

40. Plaintiff alleges that Lee "and its residents have suffered and will continue to suffer damages from their inability to use the Housatonic River *as specified by EPA.*" *Id.* ¶ 128 (emphasis added).

41. Plaintiff alleges that Lee and its residents "will suffer damages after GE complies with the 2022 CERCLA Order." *Id.* ¶ 129.

42. Plaintiff seeks compensatory and punitive damages from GE for itself and its residents caused by GE's compliance with the 2022 CERCLA Order and for future "harm to humans and the environment." *Id.* ¶¶ 30, 128-37.

III. REMOVAL IS PROPER UNDER 28 U.S.C. § 1442(a)(1).

A. 28 U.S.C. § 1442(a)(1) Allows a Company Acting Under the Authority of a Federal Officer to Remove Actions to Federal Court.

43. Section 1442(a)(1) allows "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States" to remove a case to federal court. 28 U.S.C. § 1442(a)(1). Private entities, such as government contractors, "fall within the terms of the federal officer removal statute . . . when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007). Unlike the general removal provision, which is strictly construed in favor of remand, Section 1442(a)(1) is broadly construed in favor of removal. *Id.* at 147-48; *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

44. Under Section 1442(a)(1), GE bears the burden of establishing that (1) it is "acting under" the authority of a federal officer; (2) the charged conduct was carried out "for or relating to" the asserted official authority; and (3) GE has a "colorable federal defense." *Moore v. Elec.*

Boat Corp., 25 F.4th 30, 34 (1st Cir. 2022) (citations omitted).

45. Section 1442 codifies a specialized removal doctrine and confers federal removal jurisdiction in cases where a colorable federal defense is raised in the removal petition. *Mesa v. California*, 489 U.S. 121, 136 (1989). “And a removing defendant need not have a colorable federal defense for every claim; one colorable federal defense against one asserted claim is enough.” *DeFiore v. SOC LLC*, 85 F.4th 546, 558 (9th Cir. 2023) (citing *Mesa*, 489 U.S. at 129). Section 1442 allows removal “regardless of whether the suit could originally have been brought in a federal court.” *Willingham*, 395 U.S. at 405; *Me. Ass’n of Interdependent Neighborhoods v. Comm’r, Me. Dep’t of Human Servs.*, 876 F.2d 1051, 1055 (1st Cir. 1989). Specifically, it opens the doors to federal court even when there is no federal question on the face of the well-pleaded complaint. *Mesa*, 489 U.S. at 136. The Supreme Court has made clear that Section 1442 removals “**must be ‘liberally construed.’**” *Watson*, 551 U.S. at 147 (citation omitted) (emphasis added).

46. By permitting colorable federal defenses to be litigated in the federal courts, Section 1442 protects the federal government from the interference of state court proceedings. *Watson*, 551 U.S. at 150; *Willingham*, 395 U.S. at 406-07. Whether by an independent contractor or a federal employee, “there is obviously implicated the same interest in getting the Government’s work done.” *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 (1988). For these reasons, the Supreme Court construes Section 1442 liberally, see *Watson*, 551 U.S. at 147, and removals under Section 1442 are not burdened by the ordinary presumption against removal. *Cnty. Bd. of Arlington v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 251 (4th Cir. 2021) (citation omitted). The right to remove under Section 1442 is “**absolute** whenever a suit in a state court is for any act ‘under color’ of federal officer.” *Willingham*, 395 U.S. at 406 (emphasis added).

47. Defendants wishing to remove must provide “a short and plain statement of the

grounds for removal.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 83 (2014). “A statement ‘short and plain’ need not contain evidentiary submissions.” *Id.* at 84. Courts thus may consider allegations in the notice of removal to “ascertain[] that the case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3). Courts should “apply the same liberal rules [to removal allegations] that are applied to other matters of pleading.” *Dart Cherokee*, 574 U.S. at 87 (quoting H.R. Rep. No. 100-889, p. 71 (1988)). Thus, GE must allege facts plausibly supporting its Section 1442 removal. The Court then accepts those allegations as true and draws all reasonable inferences in GE’s favor. *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1098 (9th Cir. 2018); *see Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941, 945 (7th Cir. 2020) (“At this stage, a defendant’s allegations in support of removal need only be ‘facially plausible,’ and the defendant receives the ‘benefit of all reasonable inferences from the facts alleged.’” (citations omitted)).

B. Federal-Officer Removal Is Proper Based on GE’s Alleged Inadequate Remediation of PCB Sites Pursuant to the EPA’s Control and Direction.

1. GE Was “Acting Under” the Authority of a Federal Officer.

48. In 2000, a Massachusetts federal court entered a consent decree between GE, the EPA, and the states of Massachusetts and Connecticut to remediate sites in the Pittsfield area and Housatonic River. *Church*, 138 F. Supp. 2d at 173; *see also* Ex. 2, Consent Decree.

49. “The Consent Decree was a product of a complaint filed by the United States on behalf of the EPA, the Department of the Interior, and the National Oceanic and Atmospheric Administration pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (‘CERCLA’), 42 U.S.C. §§ 9606 and 9607, Sections 3008 and 7003 of the Resource Conservation and Recovery Act (‘RCRA’), 42 U.S.C. §§ 6928 and 6973, and other statutes.” *United States v. Gen. Elec. Co.*, 986 F. Supp. 2d 79, 81-82 (D. Mass. 2013);

see also Ex. 2, Consent Decree, at 1 (Background ¶ A).

50. The Consent Decree “was intended ‘to resolve the [parties’] claims for response actions, response costs and natural resource damages in connection with’ the PCB contamination from GE’s manufacturing facility.” *Housatonic River Initiative*, 75 F.4th at 257 (quoting Consent Decree).

51. The “GE-Pittsfield/Housatonic River Site” to which the Consent Decree applies includes “the GE Plant Area, the Former Oxbow Areas, the Allendale School Property, the Housatonic River Floodplain - Current Residential Properties, the Housatonic River Floodplain - Non-Residential Properties, the Silver Lake Area, the Upper 1/2 Mile Reach, the 1 1/2 Mile Reach, ***the Rest of the River***, and other properties or areas to the extent that they are areas to which Waste Materials that originated at the GE Plant Area have migrated and which are being investigated or remediated pursuant to this Consent Decree.” Ex. 2, Consent Decree, at 35 (emphasis added).

52. The Consent Decree states that “the response actions selected and the Work to be performed by Settling Defendant ***shall constitute response actions taken or ordered by the President.***” *Id.* at 7 (Background ¶ R) (emphasis added). GE’s site remediation was governed by the Consent Decree, which also governs the provisions of the 2022 CERCLA Order pertaining to the currently approved plan to build the Upland Disposal Facility in Lee. Thus, both the prior remediation by GE and the Upland Disposal Facility to be built pursuant to the 2022 CERCLA Order “constitute actions taken or ordered by the President” executed through EPA. *Id.* Accordingly, GE has conducted a responsible and comprehensive remediation with respect to PCBs used at its Pittsfield facility and has done so while acting under the authority of a federal officer when it acted on behalf of, or was ordered by, the President of the United States, or his agents.

53. The actions GE has taken, is taking, and will continue to take in furtherance of building the Upland Disposal Facility in Lee and with respect to its continuous effort to remediate PCB pollution in Berkshire County, likewise, constitute actions ordered by the authority of a federal officer, namely, the President of the United States, or his agents.

54. The Consent Decree requires GE to “finance and perform the Work in accordance with this Consent Decree, the SOW, the Rest of the River SOW, and Work Plans attached to this Consent Decree, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendant ***and approved by EPA*** pursuant to this Consent Decree.” *Id.* at 44 (“Commitments by Settling Defendant”) (emphasis added). EPA approval was and is required for each aspect of GE’s remediation that Plaintiff alleges is inadequate, and further, EPA has approved the Upland Disposal Facility that Plaintiff claims is damaging to it. *Id.* GE was acting under the authority of a federal officer in performing the challenged remediation because it was accomplished in close collaboration with, and under the close supervision and direction of EPA. GE is also acting under the authority of a federal officer because it is building the Upland Disposal Facility in close collaboration with, and under the close supervision of EPA.

55. EPA expressly determined that, “[e]xcept as expressly provided in this Consent Decree, ***no further response actions*** for the areas addressed by such Removal Actions are necessary to protect human health and the environment.” *Id.* at 46 (emphasis added).

56. Not only was GE required to perform the remediation under the guidance and control of EPA as a contractual matter, but because the Consent Decree is “a judicial act,” failing to follow EPA’s direction and control could subject GE to “the powers by which a court protects its judgments, including, most notably, the power of contempt.” *Del. Valley Citizens’ Council for Clean Air v. Commonwealth of Pa.*, 533 F. Supp. 869, 880 (E.D. Pa. 1982), *aff’d*, 678 F.2d 470

(3d Cir. 1982); *Cnty. Ass'n for the Restoration of the Env't v. Nelson Faria Dairy, Inc.*, No. CV-04-3060-LRS, 2011 WL 6934707, at *2 (E.D. Wash. Dec. 30, 2011) (“Defendant is in contempt with regard to those eight violations of the Consent Decree.”). The federal government’s control over GE’s remediation performance, therefore, was both contractual and additionally, rooted in the threat of a contempt finding.

57. “In the event EPA determine[d] that [GE] ha[d] ceased implementation of any Removal or Remedial Action . . . EPA may assume the performance of such Removal or Remedial Action. . . . In the event of [such] an EPA determination . . . EPA may also assume performance of any or all other Removal or Remedial Actions Settling Defendant may invoke the procedures set forth in Section XXIV (Dispute Resolution), Paragraph 136 (Record Review), to dispute EPA’s determination that takeover of the Work is warranted under this Paragraph. *Costs Incurred by the United States in performing the Work pursuant to this Paragraph shall be considered U.S. Future Response Costs that Settling Defendant shall pay pursuant to Section XX (Reimbursement of Costs).*” Ex. 2, Consent Decree, at 364-65. That is, if GE did not perform the remediation as required in the Consent Decree, EPA would have had to perform the remediation itself and seek all costs pursuant thereto, from GE.

58. GE performed an appropriate and comprehensive remediation, pursuant to EPA’s specific control, guidance, and specifications.

59. GE will continue to perform an appropriate and comprehensive remediation, pursuant to the EPA’s specific control, guidance, and specifications with respect to the Upland Disposal Facility.

60. GE was “acting under” a federal officer in performing the remediation and will continue to do so as it facilitates remediation involving the Upland Disposal Facility. *City of St.*

Louis v. Velsicol Chem. Corp., 708 F. Supp. 2d 632, 661-62 (E.D. Mich. 2010) (holding that where the EPA exercised “direct and detailed” control over defendants’ CERCLA cleanup pursuant to settlement agreement, defendants were “properly characterized as assisting the EPA to perform a task that the government would otherwise be obligated to perform absent the agreement” such that the acting under element of federal-officer removal was met); accord *Abbo-Bradley v. City of Niagara Falls*, 73 F.4th 143, 152 (2d Cir. 2023) (Sullivan, J., concurring) (finding that defendant would have demonstrated that it was “acting under” a federal officer because its CERCLA remediation work was performed “under” specific instructions from officers of the EPA, Department of Justice, and/or Department of the Interior, and “under” ongoing supervision by additional EPA officers, but that the removal was untimely); *Greene v. Citigroup, Inc.*, No. 99-1030, 2000 WL 647190, at *2 (10th Cir. May 19, 2000) (finding the “acting under” element of federal officer removal met where “Shattuck implemented a remedy selected by the EPA, a federal agency, pursuant to CERCLA, and it was subject to civil penalties for failure to comply with that directive”); *People of State of Cal. v. H & H Ship Serv. Co.*, No. 94-10182, 1995 WL 619293, at *2 (9th Cir. Oct. 17, 1995) (holding that a corporation was “acting under” federal officer when performing tasks “taken during the course of a removal action that was under the direction and control of the Coast Guard”).

2. Plaintiff’s Claims and Allegations Relate to GE’s Remediation Performed Under the EPA’s Control and Guidance.

61. GE must demonstrate that “the charged conduct was carried out ‘for or relating to’ the asserted official authority.” *Moore*, 25 F.4th at 34 (quoting 28 U.S.C. § 1442(a)(1)). Only a “nexus” between the claims and the alleged official authority need exist; it is sufficient that at least one of the plaintiff’s claims is “connected” or “associated” with the defendant’s acts under color of federal office. *Id.* at 35 & n.4.

62. “Any single claim is independently sufficient to satisfy the ‘for or relating to’ requirement under § 1442(a)(1).” *Id.* at 35. Plaintiff’s claims are “connected” to or “associated” with GE’s remediation under color of federal office.

63. Plaintiff alleges that:

- a. “One consequence of the contamination of the River with PCBs is the massive PCB dump to be built in Lee.” Ex. 1, Compl. ¶ 108. The Upland Disposal Facility is one of the provisions authorized by the 2022 CERCLA Order, pursuant to the Consent Decree. *See generally* Ex. 2, Consent Decree; Ex. 28, 2020 CERCLA Order.
- b. “Ed Bates of GE has estimated that GE dumped 1,5[sic] million pounds of PCBs into the River between 1930 [sic] and 1979. . . EPA’s estimate[] in a 2020 publication that the River contains 600,000 pounds of PCBs. . . EPA in letter to counsel in 2022 estimates that GE will remove 50.5 tons (AKA 101,000 pounds) of PCBs from the River under the CERCLA Order, thus the poundage of PCBs that will be left on the River after GE satisfies the requirements ranges from 500,000 to 1.3 million pounds which are damaging to Lee and its residents.” Ex. 1, Compl. ¶ 110.
- c. “[The Upland Disposal Facility authorized by the 2022 CERCLA Order] was question 1 on the 2022 town election ballot. The residents rejected the [Upland Disposal Facility] with a [vote of] 665 Yes, 390 No, 47 Blanks. The ballot question read: “Shall the town require the elect board to rescind the town of Lee’s approval of the rest of River Agreement. . . . Given the CERCLA Order of 2022 the Town could not comply with the wishes of the majority of Town’s residents.”

Id. ¶ 113. This is another example of how Plaintiff bases its claim in the actions taken pursuant to the 2022 CERCLA Order, which by extension, includes the Consent Decree.

- d. “The Board of Health of Lee found after an adjudicatory hearing that ‘[b]y taking these concerns into consideration, the Lee Board of Health thereby considers that the proposed [Upland Disposal Facility] may pose an increased risk to the health of the residents of Lee.’” *Id.* ¶ 114.
- e. “The Town of Lee and its residents have suffered and will continue to suffer damages from the contamination of the River and its consequences including the massive [Upland Disposal Facility] to be built in Lee to house the dredged PCB mud.” *Id.* ¶ 122.
- f. “The Town and its residents have suffered and will continue to suffer damages from their inability to use the Housatonic Rive[r] *as specified by EPA.*” *Id.* ¶ 128 (emphasis added).
- g. “The Town and its resident[s] will suffer damages *after GE complies with the 2020 CERCLA Order* since the [Housatonic] River bottom will be covered by a tarp which GE will continue to monitor for leaks for 20 years after the 13 years of dredging have been completed.” *Id.* ¶ 129 (emphasis added).
- h. “The Town and its residents will suffer damages because in the forthcoming 13 years two billion pounds of PCB contaminated muds and soil will be dredged from the River by GE, transported in eighty-thousand-pound truck loads through the streets of Lee, and deposited within the confines of the Town of Lee in a dump projected to be 150 feet in height with a 20-acre base.” *Id.* ¶ 130.

- i. “The presence of this massive [Upland Disposal Facility] in Lee will cause severe damages to the Town and its residents for years to come. Lenox, Great Barrington, Sheffield and Stockbridge with their wealth would have litigated at infinitum any attempt by GE to locate this massive dump within their towns’ boundaries. Lee the poorest town in the Berkshires could never have afforded such continuing litigation thus GE picked Lee as a place to dump the dredged mud.” *Id.* ¶ 131. This allegation directly alleges that GE’s actions pursuant to the 2022 CERCLA Order, and by extension, the Consent Decree, have damaged Plaintiff.

64. GE’s alleged inadequate remediation thus “was carried out ‘for or relating to’ the asserted official authority” of the EPA. *Moore*, 25 F.4th at 34. Moreover, the planned Upland Disposal Facility to be built in Lee as part of the 2022 CERCLA Order will be carried out “‘for or relating to’ the asserted official authority” of the EPA. *Id.*

3. GE Has a Colorable Federal Defense Regarding Plaintiff’s Claims Predicated on an Inadequate Remediation.

65. “[A] federal defense is colorable unless it is immaterial and made solely for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous.” *Id.* at 37 (citations omitted).

66. GE has a colorable defense of federal preemption. CERCLA preempts Plaintiff’s state-law tort claims predicated on allegations that GE failed to adequately remediate sites by *not* departing from the terms of the CERCLA Consent Decree and/or by inadequately performing those terms. *See, e.g., Bartlett v. Honeywell Int’l Inc.*, 737 F. App’x 543, 549 (2d Cir. 2018) (holding that state-law tort claims were preempted by CERCLA because “at bottom the residents were impermissibly arguing, on a state tort law theory, that Honeywell should have departed from the consent decree’s terms by conducting additional or different remedial action than that mandated

by CERCLA and the consent decree”); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249-50 (10th Cir. 2006) (plaintiffs’ state-law claims were preempted where they were premised upon the inadequacy of defendants’ implementation of a CERCLA-based remedy); *see also Abbo-Bradley*, 73 F.4th at 152 (Sullivan, J., concurring) (“When we recently considered a functionally identical [CERCLA preemption] defense in 2018, we ruled that it was meritorious. Needless to say, a meritorious federal defense is, a fortiori, a ‘colorable’ one.”).

67. Because GE has met the requisite elements, federal-officer removal is proper based on Plaintiff’s claims of GE’s alleged inadequate remediation of PCB sites pursuant to the 2022 CERCLA Order.

4. GE Has a Colorable Federal Defense Regarding Plaintiff’s Claims Predicated on the Location or Construction of the Upland Disposal Facility.

68. “[A] federal defense is colorable unless it is immaterial and made solely for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous.” *Moore*, 25 F.4th at 37 (citations omitted).

69. GE has a colorable defense of federal preemption. CERCLA preempts Plaintiff’s state-law tort claim, to the extent Plaintiff pleads one, as it is predicated on allegations that GE’s compliance with the terms of the 2022 CERCLA Order, including moving forward with the construction of the Upland Disposal Facility, will damage Lee and its residents. *See, e.g., Bartlett*, 737 F. App’x at 549 (holding that state-law tort claims were preempted by CERCLA because “at bottom the residents were impermissibly arguing, on a state tort law theory, that Honeywell should have departed from the consent decree’s terms by conducting additional or different remedial action than that mandated by CERCLA and the consent decree”); *New Mexico v. Gen. Elec. Co.*, 467 F.3d at 1249-50 (plaintiffs’ state-law claims were preempted where they were premised upon the inadequacy of defendants’ implementation of a CERCLA-based remedy); *see also Abbo-*

Bradley, 73 F.4th at 152 (Sullivan, J., concurring) (“When we recently considered a functionally identical [CERCLA preemption] defense in 2018, we ruled that it was meritorious. Needless to say, a meritorious federal defense is, a fortiori, a ‘colorable’ one.”).

70. Because Plaintiff is seeking damages predicated upon GE’s implementation of the 2022 CERCLA Order, including the construction of the Upland Disposal Facility, which Plaintiff specifically alleges GE has been ordered by EPA to construct, GE has a colorable federal defense.

71. Accordingly, because GE has met the requisite elements, federal-officer removal is proper based on Plaintiff’s claims concerning GE’s compliance with the 2022 CERCLA Order, including the construction of the Upland Disposal Facility.

C. Federal-Officer Removal Is Proper Based on GE’s Manufacture of PCB-Containing Products Required by the Federal Government for Its Purchases.

1. GE Was “Acting Under” the Authority of a Federal Officer.

72. In the context of Section 1442(a)(1), the Supreme Court has interpreted “acting under” a federal officer to contemplate a relationship where the private party engages in an effort “to assist, or to help carry out, the duties or tasks of the federal superior.” *Watson*, 551 U.S. at 151-52. The words “acting under” are “broad” and “liberally construed.” *Id.* at 147.

73. In *Watson*, the Supreme Court explained that contracting with the government to produce an item the government needs and would have to produce itself but for the contract with the private entity constitutes “acting under” for purposes of federal-officer removal:

[T]he private contractor in such cases is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of *Winters* [149 F.3d 387], for example, Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

Id. at 153-54.

74. In manufacturing the PCB-containing products at issue in this case, GE acted under the ongoing direction, control, and supervision of the federal government. The federal government required the use of PCBs in products that it regularly purchased from GE. The federal government ***mandated*** that GE use PCBs in the products GE manufactured and the federal government purchased. The federal government also set procurement specifications for the PCB-containing products GE made and sold to the federal government.

75. GE has demonstrated “acted under” federal government authority by manufacturing and selling to the federal government products (transformers and capacitors containing Pyranol (PCBs) and Pyranol itself to maintain such transformers) that the federal government considered “essential,” and for which the government also set procurement specifications ***requiring*** GE to use PCBs in the products, which the government would have had to produce itself but for the contracts with GE. *See Watson*, 551 U.S. at 153-54.

2. Plaintiff’s Allegations Relate to GE’s Manufacture of PCBs Per Federal Government Specifications to Supply the Federal Government.

76. GE must demonstrate that “the charged conduct was carried out ‘for or relating to’ the asserted official authority.” *Moore*, 25 F.4th at 34 (quoting 28 U.S.C. § 1442(a)(1)). The requirement that a claim be “for” or “relate to” the alleged federal authority is not a causal requirement and is not to be understood as anything more than a “related to” nexus. *Id.* at 35. Only a “nexus” between the claims and the alleged official authority need exist; it is sufficient that at least one of the plaintiff’s claims is “connected” or “associated” with the defendant’s acts under color of federal office. *Id.* at 35 & n.4.

77. “Any single claim is independently sufficient to satisfy the ‘for or relating to’ requirement under § 1442(a)(1).” *Id.* at 35. At least one of Plaintiff’s claims is “connected” or

“associated” with GE’s manufacture of products with PCBs for sales to the federal government, which is the “charged conduct” GE took under the authority of the federal government:

- a. Plaintiff alleges that “Defendant GE profited from this product and discarded hundreds of thousands of pounds of no longer usable product into the Housatonic River . . .” Ex. 1, Compl. ¶ 3. The discharge of PCBs into the Housatonic River from GE’s Pittsfield, Massachusetts facility is one of the bases on which Plaintiff brings this lawsuit.
- b. Plaintiff alleges that “GE[’s continued] use of the toxic product created a catastrophe to the Town of Lee and its residents for which both GE and Monsanto are responsible.” *Id.* ¶ 11. The “toxic product” Lee refers to is PCBs. *See generally id.*
- c. Plaintiff brings this suit “seeking monetary compensation from GE and Monsanto for the damages that PCBs have inflicted on the Town and its residents.” *Id.* ¶ 18. Plaintiff further states in its Complaint that “[t]he Town of Lee is seeking from Monsanto and GE adequate compensatory and punitive damages for the harm both companies intentionally caused to Lee by creating profits for their shareholders without justification.” *Id.* ¶ 25.
- d. In Paragraph 62 on Page 14 of the Complaint,⁵ Plaintiff alleges that “PCBs used in [GE] electrical transformers lost [their] insulating properties after some usage, at which time GE collected and disposed of the PCBs by burying them in the City at various locations or by dumping the PCBs into the Housatonic River . . . that runs through the City and the towns of Lenox, Lee, Great Barrington, Sheffield[,] and

⁵ Plaintiff’s Complaint repeats certain paragraph numbers. *See, e.g.*, Complaint at 11-14.

Stockbridge.”

- e. With respect to GE’s future remediation plans, Plaintiff alleges in support of its claim that the “[d]redging of PCBs imbedded in mud at 25 ppm concentration and transporting the two million tons of mud . . . through the streets of Lee for the next 13 years is damaging to Lee and its residents.” *Id.* ¶ 64. Plaintiff furthermore alleges that “[l]eaving anywhere between 100,000 to 500,000 pounds of PCBs in the [Housatonic] River covered by a tarp that will have to be monitored for the next 20 years—after the dredging is completed—has damaged, and will damage Lee and its residents.” *Id.* ¶ 65.
- f. Plaintiff alleges that “the PCBs purchased by GE . . . have created . . . massive damages to Lee and its residents.” *Id.* ¶ 66.

78. The conduct challenged by the Complaint therefore “was carried out ‘for or relating to’ the asserted official authority.” *Moore*, 25 F.4th at 34 (quoting 28 U.S.C. § 1442(a)(1)). GE’s sale of transformers and capacitors with PCBs was conducted under the color of federal office because the U.S. government, through sales contracts and regulations, compelled continued manufacture of these PCB-containing products to advance what it deemed necessary governmental and public interests.

3. GE Has Colorable Federal Defenses.

79. Under Section 1442(a)(1), a “colorable [federal] defense” need not be “clearly sustainable.” *Willingham*, 395 U.S. at 407. The Supreme Court has rejected a “narrow, grudging interpretation” of the requirement. *Id.*

80. “[A] federal defense is colorable unless it is immaterial and made solely for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous.” *Moore*, 25 F.4th at 37

(citations omitted).

81. GE has two colorable federal defenses within the meaning of the federal officer removal statute—the government-contractor defense and federal preemption.

a. GE Has a Government-Contractor Defense.

82. First, GE has a government-contractor defense to Plaintiff’s claim. GE was acting as a government contractor when it engaged in the actions complained of in this case. Indeed, the federal government purchased many of the products manufactured with PCBs at issue.

83. The government-contractor defense applies when “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” *Boyle*, 487 U.S. at 512.

84. GE has alleged and offered corroborative evidence that (i) the federal government required the use of PCBs in GE’s products and set procurement specifications for those products, (ii) GE’s products conformed to the federal government’s requirements and specifications, and (iii) GE informed the federal government of any hazards inherent in the use of PCBs that GE was aware of but the federal government was not. Indeed, the federal government knew as much, if not more, than GE about this issue. *See, e.g.*, Ex. 4, Interdepartmental Task Force on PCBs, Polychlorinated Biphenyls and the Environment, at 2 (May 1972) (stating that the government task force completed “a six month review of the chemicals known as PCBs”); Ex. 29, Letter from Gerald Barney to Charles Sommer (Jan. 17, 1972) (stating the Navy’s belief that “one of the most serious threats to the marine environment is the class of chemicals known as polychlorinated biphenyls”).

85. The federal government, including the military, specifically directed GE to sell

products containing PCBs for governmental and military uses. These sales to the military continued for decades. In 1974, the United States Naval Facilities Engineering Command told GE that it was “essential” that it be able to obtain Pyranol from GE to service the many transformers and electrical devices it had purchased from GE. Ex. 25, Navy Letter to GE, Mar. 26, 1974.

86. Accordingly, the government-contractor defense is colorable. *See Moore*, 25 F.4th at 37 (government-contractor defense can constitute a “colorable” federal defense for federal-officer removal).

b. GE Has Federal Preemption Defenses.

87. GE also has a colorable defense of federal preemption.

88. “[U]nder the Supremacy Clause, from which [the] pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (citations omitted).

89. The Toxic Substances Control Act (“TSCA”) includes an express preemption clause. *See* 15 U.S.C. § 2617. TSCA expressly states that where the EPA issues rules applicable to PCBs that are intended to protect against a health or environmental risk associated with PCBs, then no state may impose any non-identical requirement “applicable” to PCBs. *Id.* § 2617(a)(2)(b).

90. Pursuant to TSCA’s delegation of rulemaking authority under 15 U.S.C. § 2605, the EPA has promulgated a comprehensive set of rules regulating the manufacture, distribution, and use of PCBs. Those rules are codified at 40 C.F.R. § 761.20 *et seq.* Among the EPA’s promulgated rules are rules governing the manufacture, distribution, and use of PCBs. *See* 40 C.F.R. §§ 761.20 (regulating use, manufacture, processing and distribution of PCBs), 761.30 (authorizing certain “non-totally enclosed PCB activities”), 761.35 (governing storage of PCBs

for reuse), and 761.40 (marking requirements).

91. The EPA's rules also are intended to protect against health and environmental risks associated with PCBs. *See, e.g.*, 40 C.F.R. § 761.20 ("the Administrator hereby finds . . . that the manufacture, processing, and distribution in commerce of PCBs at concentrations of 50 ppm or greater . . . present an unreasonable risk of injury to health within the United States"); 43 Fed. Reg. 7150 ("The intent of these regulations [40 CFR Part 761] is to protect the environment from further contamination by PCB's resulting from improper handling and disposal of PCBs.").

92. Because the EPA promulgated rules regulating the manufacture, distribution, and use of PCBs to protect against certain health risks associated with PCBs, TSCA expressly preempts any state-law requirements that are "applicable" to PCBs, intended to protect against a health risk, and not identical with the EPA's rules.

93. Here, Plaintiff's common-law tort claim, to the extent such a claim is recognized in the Commonwealth, constitutes state-law "requirements" for preemption purposes. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. Absent other indication, reference to a State's 'requirements' includes its common-law duties."). The tort claims are also "applicable" to alleged health risks associated with PCBs. And, finally, because GE complied with the EPA's rules concerning the distribution and sale of products with PCBs, Plaintiff is seeking to impose state-law requirements that are not identical to the EPA's rules promulgated under TSCA.

94. Plaintiff's claims are also impliedly preempted. The EPA's comprehensive regulation of the manufacture, sale, and use of PCBs constitutes field preemption. Moreover, Plaintiff's claim that "the actions of GE in continuing to profit from use [of] the product even it caused harm to humans and the environment was an intentional act," Ex. 1, Compl. ¶ 9; conflicts

with OSHA regulations allowing for their manufacture and continued use. *See* Electrical Standard, 72 Fed. Reg. 7,136 (Feb. 14, 2007) (to be codified at 29 C.F.R. pt. 1910); Application of Certain Electrical Standards, 37 Fed. Reg. 3,431 (Feb. 16, 1972) (to be codified at 29 C.F.R. pt. 1910).

95. GE has a colorable federal-preemption defense under the federal officer removal statute. *See, e.g., Butler v. Coast Elec. Power Ass’n*, 926 F.3d 190, 192 (5th Cir. 2019) (“As they have a **colorable** federal preemption defense, the cooperatives were entitled to remove under 28 U.S.C. § 1442’s provision for federal officer removal.”); *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1146 (11th Cir. 2017).

96. Federal-officer removal is proper based on Plaintiff’s claims predicated on GE’s manufacture and sale of PCB-containing products.

IV. GE IS A “PERSON” UNDER SECTION 1442(A)(1).

97. GE is a “person” within the meaning of 28 U.S.C. § 1442(a)(1). *Moore*, 25 F.4th at 32 (“hold[ing] that Electric Boat has established the statutory requirements for removal”); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 484-86 (1st Cir. 1989).

V. GE CAN REMOVE THIS ACTION WITHOUT THE CONSENT OF ITS CO-DEFENDANTS.

98. “Federal officer removal constitutes an exception to the general rule that removals must be unanimously agreed to by the defendants.” *Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187, 195 (D. Mass. 2008) (citing *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998)); *accord, e.g., Iowa Pub. Serv. Co. v. Iowa State Com. Comm’n*, 407 F.2d 916, 918 n.3 (8th Cir. 1969) (“[T]he federal officer alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court.”).

VI. VENUE

99. Venue is proper in the District of Massachusetts because this is the district “within

which such action is pending.” 28 U.S.C. § 1446(a).

VII. NOTICE OF REMOVAL AND JURY DEMAND

100. Pursuant to 28 U.S.C. § 1446, filing a copy of this Notice with the Clerk of the State Court effects the removal of the state-court action. A copy of the Notice to Adverse Party and State Court of Removal of Action to Federal Court to be filed contemporaneously in the state court is attached as Exhibit 30.

101. No waiver and no admission of fact, law, or liability, including (without limitation) the amount of damages, if any, is intended by this Notice of Removal, and all defenses, affirmative defenses, and rights are hereby reserved.

102. Pursuant to Fed. R. Civ. P. 81(c), GE will file its answer or present its other defenses or objections available under the Federal Rules within seven days after the filing of this Notice of Removal or it will obtain an extension of time to file such pleadings.

103. GE demands a trial by jury on all claims so triable.

CONCLUSION

For the reasons set forth above, GE removes this action to the United States District Court for the District of Massachusetts.

Dated: April 9, 2024.

DEFENDANT GENERAL ELECTRIC
COMPANY,

By its Attorneys,

/s/ James M. Campbell

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CERTIFICATE OF SERVICE

I, James M. Campbell, hereby certify that on this 9th of April 2024, I electronically filed the foregoing with the Clerk of the Court using the Court's electronic filing system (ECF). The foregoing document is also available for viewing and/or downloading from ECF. Said document was also sent via Electronic Mail to the following counsel of record:

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